85-424

No.

Supreme Court, U.S.
FILED
AUG 1 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the

Supreme Court of the United States

October Term, 1985

JONATHAN D. MEAD, a minor by
WILKIN MEAD, JR., his father
and next friend,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

EDWARD J. KIONKA
Winters & Garrison
111 West Main Street
P.O. Box 700
Marion, IL 62959
(618) 997-5611

Attorney for Petitioner

August 1, 1985

No.

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JONATHAN D. MEAD, a minor by
WILKIN MEAD, JR., his father
and next friend,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner JONATHAN D. MEAD, a minor by WILKIN MEAD, JR., his father and next friend, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on May 3, 1985.

QUESTION PRESENTED

The sole issue presented for review is whether the district court erred in restricting plaintiff's direct examination of his key expert witness, Dr. John Davies, and in substituting Dr. Davies' deposition for his available in-court testimony.

TABLE OF CONTENTS

QUESTION PRESENTED. 2

OPINION BELOW 4

JURISDICTIONAL GROUNDS. 4

STATUTES OR RULES INVOLVED. 4

STATEMENT OF THE CASE 5

THE QUESTION IS SUBSTANTIAL 9

A. The District Court's Ruling Directly Contravenes This Court's Mandate In Federal Rule of Civil Procedure 43(a). 9

B. The Ruling of the Seventh Circuit Court of Appeals Creates a Conflict Between the Circuits. 14

C. The Importance of the Question. 22

CONCLUSION. 25

APPENDIX:
Opinion of the United States Court of Appeals, Seventh Circuit. . . . Appendix 1

District Court's Findings of Fact and Conclusions of Law. . . . . Appendix 7

District Court's Oral Findings.Appendix 17

TABLE OF AUTHORITIES

Statutes or Rules Involved

Federal Rule of Civil Proc. 43(a) . . . 9

Federal Rule of Civil Proc. 32(a)(3) 11-12

Cases

Frechette v. Welch, 621 F.2d 11 (1st Cir. 1980) 14

United States v. International Bus. Mach. Corp., 90 F.R.D. 377 (S.D.N.Y. 1981) 18

Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946). 19

Salsman v. Witt, 466 F.2d 76 (10th Cir. 1972). 21

Other Authorities

4A J. Moore, Moore's Federal Practice, ¶ 32.05 (2d ed. 1984) 12-13

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, which appears beginning at Appendix 1, was an unpublished order. The district court did not file or publish any opinion; its findings of fact and conclusions of law do not refer to the issue involved in this appeal.

JURISDICTIONAL GROUNDS

The judgment of the Court of Appeals for the Seventh Circuit was entered on May 3, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES OR RULES INVOLVED

Federal Rule of Civil Procedure 43(a):

> (a) Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court.

Federal Rule of Civil Procedure 32(a)(3):

(e) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

STATEMENT OF THE CASE

This is a tort action brought under the Federal Tort Claims Act, 28 U.S.C. § 1291, et seq., in the United States District Court for the Southern District of Illinois. Most of the facts are not disputed, and were found in plaintiff's favor in the district court. In August of 1978,

plaintiff, then an infant of one year, resided with his adoptive parents in government housing at Scott Air Force Base near Belleville, Illinois. Just prior to the Mead's occupancy, the government treated the premises with a termite poison containing a chemical called chlordane. Plaintiff claimed that the government was guilty of extreme and outrageous conduct in that it knew of the danger to which it exposed plaintiff and his family but allowed them to reside in the treated apartment and did not notify them of the danger. Plaintiff alleged that, as a result of his exposure to the chlordane, he sustained permanent debilitating injuries, as well as pain and suffering and emotional distress.

At trial, plaintiff called as his principal expert witness Dr. John Davies. Plaintiff had taken the deposition of Dr.

Davies prior to trial, in case Dr. Davies (a Florida resident) was unavailable at the time of trial. Dr. Davies' deposition, along with all other depositions, had been supplied prior to trial to Judge Beatty at the judge's request, in order that he could familiarize himself with the case. During plaintiff's examination of Dr. Davies at trial, plaintiff sought to question him in detail concerning the key elements of his claim that the toxic chlordane was the cause of plaintiff's injuries. However, the district court sustained the government's objections to Dr. Davies' testimony on the ground that the matters to which he sought to testify were already contained in his deposition. The court ruled that Dr. Davies would not be allowed to testify to any matter covered in his deposition. Plaintiff made an offer of proof as to what Dr. Davies'

testimony at trial would have been. The offer of proof was denied.

At the conclusion of the trial, Judge Beatty found that the government was guilty of the negligence charged in the complaint and that plaintiff had been exposed to an excessive amount of chlordane. However, Judge Beatty entered judgment for the defendant and against plaintiff on the ground that plaintiff had not proved that the chlordane had caused his injuries. Judgment was entered March 15, 1984, and plaintiff's post-trial motion was denied on April 27, 1984.

Plaintiff appealed to the United States Court of Appeals for the Seventh Circuit on the sole issue of whether the trial court had erred in refusing to hear Dr. Davies' oral testimony regarding matters covered in his deposition. The Seventh Circuit accepted defendant's rep-

resentation that there had been a pre-trial agreement between counsel to the effect that, in exchange for defendant's agreement to waive all Rule 26(b)(4) objections to the Davies deposition, plaintiff would submit the deposition as evidence in lieu of Dr. Davies' live testimony. This alleged agreement is not a part of the record in this case, and was described for the first time in the government's brief on appeal and in oral argument before the court of appeals. Counsel for plaintiff, in his reply brief and also in oral argument, vigorously denied that the alleged agreement was made. The court of appeals, in its unpublished order, appears to have accepted the government's assertion dehors the record, and concluded that plaintiff suffered no prejudice from the trial court's ruling on the deposition. Citing the district

court's broad discretion in admitting and excluding evidence, the court of appeals affirmed the district court's judgment for defendant.

THE QUESTION IS SUBSTANTIAL

A. The District Court's Ruling Directly Contravenes This Court's Mandate In Federal Rule of Civil Procedure 43(a).

The sole issue on appeal is whether the trial court improperly refused to admit the live testimony of Dr. Davies regarding matters covered in his deposition. Federal Rule of Civil Procedure 43(a) expresses this Court's strong preference for oral testimony, in providing in "all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided" by rule or statute. Fed. R. Civ. P. 43(a) (emphasis added). The decision of the district court to bar the expert's live testimony

as to those matters contained in his deposition is in direct contravention of the clear mandate of Rule 43.

This policy is so strong that, ordinarily, even the express agreement of the parties is not permitted to override it. Thus, in the instant case, even if there had been an agreement as alleged by the government, the district court was still required, absent circumstances not present here, to hear the oral testimony of Dr. Davies.

There is no discretion in this matter. Testimony must be taken in open court unless the provisions of some other statute or rule allow otherwise. Here, the only possible statute or rule is Federal Rule of Civil Procedure 32(a)(3), which provides for the use of depositions where the witness is dead, farther than 100 miles from the place of trial or hear-

ing, or is unable to attend, where the party offering the deposition cannot subpoena the witness, or

> where such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, ...

Fed. R. Civ. P. 32(a)(3) (emphasis added). Because Dr. Davies, in fact, did appear at trial, it cannot be argued that any of the provisions, other than the last, allowing use of depositions as evidence applied in this case. In discussing the meaning of this final provision, Moore discussed the legislative history of the rule, and concluded that the strong policy preference for oral testimony would extend even to situations where the parties have agreed to substitute depositional evidence for live testimony.

> In the Advisory Committee's Preliminary Draft there was a provision that a

> deposition could be used for any purpose at the trial "if the parties affected thereby consent thereto with the approval of court." This provision was dropped, and the present provision substituted, apparently because it was feared that the court would grant its approval whenever the parties consented to the use of depositions, and thereby to that extent nullify the salutary rule that testimony of witnesses shall be taken orally in open court.

4A J. Moore, Moore's Federal Practice, ¶ 32.05 at pp. 32-30, 32-31 (2d ed. 1984) (emphasis added). Thus, even if (as the government claims but plaintiff denies) there was some pre-trial agreement regarding the use of Dr. Davies' deposition, it would have been unavailing under the circumstances of this case, where Dr. Davies appeared at trial and testified to some matters. The district court would have been bound to honor the policy in favor of hearing live testimony where available. The court of appeals erred in finding that the restriction of Dr. Davies' testimony at

trial was a matter within the district court's discretion.

B. The Ruling of the Seventh Circuit Creates a Conflict Between the Circuits.

The Seventh Circuit's approval of the use of depositional testimony when the deponent is available at trial and when the party offering the testimony expresses an unwillingness to allow the deposition to take the place of the live testimony conflicts with rulings of several other circuit courts of appeals. And at least one other circuit court of appeals has expressly held that, even where the parties have stipulated to the use of depositions where the deponent is available at the time of trial, the depositions are inadmissible, and live testimony must be allowed instead.

First Circuit. In Frechette v. Welch, 621 F.2d 11 (1st Cir. 1980), the

parties stipulated prior to trial that a videotaped deposition of one of the expert witnesses would be admissible at trial if the conditions of the New Hampshire statute allowing the use of depositions were met. The state statute provided that all depositions were admissible as evidence, unless the objecting party procured the deponent to attend the trial. The First Circuit held that the parties' stipulation did not allow them to circumvent the Federal Rules of Civil Procedure and the clear mandate that live testimony was to be heard wherever possible. Since the defendant had failed to prove that any of the conditions for the use of depositions contained in Rule 32(a)(3) existed, the district court's allowance of the use of depositions as evidence was erroneous. The court further found that the stipulation, contained verbatim in the record,

was insufficiently explicit to constitute a waiver of plaintiffs' federal rights under Rule 32. The First Circuit deemed the right to present live testimony so important that it could not be found to have been waived in the absence of language explicitly proclaiming the party's intention to waive that right.

In the case at bar, the alleged stipulation cannot be deemed sufficiently explicit to constitute a waiver of plaintiff's right to present live testimony where the witness is available, and, in fact, does testify at trial. Here, the conditions of the agreement, if indeed such an agreement was ever reached, do not appear anywhere in the record. It is only clear that the government agreed at some point prior to trial to waive some of its objections to Dr. Davies' deposition. Plaintiff argued that the government

agreed to waive all objections; the government countered that it had agreed to waive only its Rule 26(b)(4) objections. No where in the record does it appear that, in exchange for this waiver, plaintiff agreed to submit the deposition in lieu of Dr. Davies' live testimony.

Plaintiff's counsel admitted that discussions concerning defendant's objections to the deposition had been held, but explained that no agreement had been reached. In his reply brief and at oral at oral argument in the court of appeals in response to defendant's allegations in its answering brief, counsel denied having agreed to this waiver of plaintiff's right to present direct testimony. However, despite the absence of any terms of this alleged agreement in the record, and despite plaintiff's counsel's repeated assurances that no such agreement had been

reached, the court of appeals found that plaintiff had waived his Rule 43 right to present live testimony. This conclusion cannot be reconciled with the the law as expressed by the First Circuit in Frechette. In order to find a waiver of plaintiff's federal rights to present live testimony, the court of appeals would have to have found an express agreement clearly stating plaintiff's intention to relinquish that right. See also, United States v. International Bus. Mach. Corp., 90 F.R.D. 377 (S.D.N.Y. 1981) (where, although the stipulation to permit use of depositions was part of the record, the court refused to find that plaintiff had waived its right to present live testimony, where deponents, in fact, testified at trial). The facts in this case do not support a finding that plaintiff clearly intended to waive this right.

Second Circuit. In Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946), the Second Circuit quoted with approval Moore's discussion of the legislative history of the rule pertaining to depositional evidence discussed in our preceding section. Moore maintained that, even if the parties stipulated to the use of depositions, the court could not allow the substitution of depositional evidence for live testimony in the absence of one of the circumstances listed in the rule allowing such use of depositions. In Arnstein, the court held that even if defendant sought to substitute his own deposition for his testimony on the stand at trial, he could not do so under the rule. 154 F.2d at 472. As in our case, the first provisions of the rule would not permit the substitution, and no argument under the final provision, for "exception-

al circumstances," had been advanced. The court viewed the suggestion that the case be tried upon depositions and affidavits, rather than live testimony, as an attempt to return to the equity practice that existed in federal courts prior to 1912. It rejected the possibility that the rule allowing the use of depositions where the deponent is unavailable or where "exceptional circumstances" exist was intended to permit this type of "trial by affidavits," if either party objects. 154 F.2d at 471.

Here, there is insufficient evidence in the record to support defendant's argument and the Seventh Circuit conclusion that plaintiff had waived his right to present live testimony through counsel's stipulation to use Dr. Davies' deposition in lieu of his live testimony. Moreover, plaintiff strenuously objected to the

district court's restriction of his right to present live testimony on the causation issue. Under these facts, the decision of the Seventh Circuit approving the district court's restriction of plaintiff's examination of Dr. Davies is contrary to the law as expressed by the Second Circuit in Arnstein.

Tenth Circuit. In Salsman v. Witt, 466 F.2d 76 (10th Cir. 1972), the Tenth Circuit stated, in dicta, that even if the depositions in question had been offered into evidence (which they were not), they would not have been admissible substitutions for the deponents' live testimony, because none of the exceptions listed in Rule 32(a)(3) was met. In Salsman, the deponents testified briefly at trial, and it was obvious that the district court had supplemented their testimony with information taken from their depositions in

reaching its judgment on the case. The Tenth Circuit held that, because the depositions would not have been admissible under Rule 32, the trial court's reliance upon them constituted reversible error.

Here, also, none of the exceptions to the use of live testimony existed. The alleged agreement to substitute Dr. Davies' deposition for live testimony on the issues covered in it was, if it existed at all, insufficiently explicit to constitute a waiver of plaintiff's right to present live testimony. Under these circumstances, the Seventh Circuit's ruling is contrary to the law as expressed by the Tenth Circuit in Salsman.

C. The Importance of the Question.

This case presents an issue of real importance in the administration of civil trials in federal courts. One of the most fundamental rights of American citizens --

embodied in the due process clause of the Constitution and of all state constitutions -- is the right to have a full and fair hearing of one's justiciable claim or grievance. The confrontation clause, although not applicable in civil cases such as this, reflects the fundamental value of in-court testimony, where the witness's demeanor bears strongly on the credibility of his testimony. Moreover, in the instant case, it is seriously unfair to deny the claim of this injured minor child without giving him the opportunity to present his evidence. Plaintiff's counsel had no reason to suspect that his case would be frozen as of the time of his expert's deposition. He had no notice that the expert's live testimony would be rejected. If he had, perhaps he would have taken a different approach with respect to the deposition.

Rule 43(a) is a rule of this Court. Its terms are clear and unambiguous. If a district court ignores it, is that not a direct abuse of the authority of this Court? If Rule 43(a) can be so easily ignored, why not the other rules as well?

We respectfully urge that so patent a violation of so important a principle -- the right to in-court testimony -- should not be allowed. Moreover, as we have shown, the circuit court of appeal's decision is in direct conflict with the holdings of other courts of appeals on the same issue. Thus, this case involves both the rights of this plaintiff and other persons similarly situated, and the general public interest in the uniformity of interpretation so necessary in the administration of the Federal Rules of Civil Procedure.

CONCLUSION

For the foregoing reasons, petitioner JONATHAN D. MEAD, a minor, by WILKIN MEAD, JR., his father and next friend, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on May 3, 1985.

Respectfully submitted,

EDWARD J. KIONKA
Winters & Garrison
111 West Main Street
P. O. Box 700
Marion, IL 62959
(618) 997-5611

Attorney for Petitioner

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Unpublished Order

No. 84-1911

JONATHAN D. MEAD, a minor by WILKIN MEAD, JR., his father and next friend,
Plaintiff-Appellant,

-vs-

UNITED STATES OF AMERICA,
Defendant-Appellee.

May 3, 1985

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. WILLIAM J. JAMESON, Sr. Dist. Judge

ORDER

In an action brought under the Federal Tort Claims Act, 28 U.S.C. § 1291 et seq. (19), plaintiff alleged that the government negligently applied an insecti-

cide containing clordane [sic] to the military base apartment assigned to plaintiff's family and that as a result of exposure to the chlordane plaintiff sustained permanent brain damage. Plaintiff also sued for pain and suffering and emotional distress resulting from the exposure and injury. After a bench trial the district court found that the government had negligently applied the insecticide and that plaintiff had been exposed to an excessive amount of chlordane, but that plaintiff had not proved that the chlordane had caused his injuries, and therefore the court entered judgment for the defendant. The sole issue on appeal is whether the district court erred by restricting plaintiff's direct examination of one of his expert witnesses, Dr. John Davies. The trial court did not allow Dr. Davies to testify as to matters contained

in a deposition he had given which had already been admitted into evidence. We affirm the judgment of the district court.

The underlying facts of this lawsuit are not relevant to this appeal; therefore, we will discuss only the salient circumstances surrounding the ruling which plaintiff contests. Prior to trial the district judge requested each party to submit all depositions which they intended to introduce at trial. Plaintiff submitted the deposition of Dr. John Davies to the court and later informed defendant and the court that he intended to introduce it at trial as an evidentiary deposition. Apparently concerned about objections to the deposition made by defendant at the time it was taken, plaintiff obtained an oral agreement from defendant that defendant would waive these objections if the deposition would be admitted into evidence

in lieu of Dr. Davies's live testimony. Plaintiff subsequently submitted the deposition to the court and it was admitted into evidence before plaintiff called his first witness.

During the trial, plaintiff called Dr. Davies to the witness stand in order to rebut the testimony of one of defendant's expert witnesses. Once on the stand, however, plaintiff began asking Dr. Davies questions which were contained in his deposition, the answers to which were therefore already admitted into evidence. The court sustained defendant's objection that this testimony was cumulative. Plaintiff now claims that this ruling amounted to reversible error.

A trial court's evidentiary rulings will not be reversed on appeal absent a clear showing of abuse of discretion. United States v. Cannon, 715 F.2d 1228,

1232 (7th Cir. 1983). Rule 403 of the Federal Rules of Evidence permits the exclusion of relevant evidence if that evidence is merely cumulative. Under Rule 403 "[t]he District Court retains considerable latitude even with admittedly relevant evidence in rejecting that which is cumulative." Hamling v. United States, 418 U.S. 87, 127 (1974). We find that the trial judge's ruling which plaintiff now challenges was not an abuse of the trial judge's considerable discretion.

As stated above, the testimony which the trial judge excluded was merely a recitation of statements already admitted into evidence through plaintiff's deposition of Dr. Davies. It is not apparent, as plaintiff now asserts, that plaintiff suffered any prejudice simply because the court considered Dr. Davies's statements in written rather than oral form. More-

over, plaintiff tendered the deposition as evidence with the understanding that it would be used instead of live testimony from Dr. Davies as part of an agreement with the defendant of which the trial judge was apprised.

Under the agreement, defendant waived its objections to the deposition and Dr. Davies was not to be called as a witness to testify as to matters contained therein. Thus, it was plaintiff's trial strategy that the court consider this evidence in the form of a deposition rather than in the form of testifying from the witness stand. For these reasons, the judgment of the district court is affirmed.

No. 80-5270

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

JONATHAN D. MEAD, a minor by WILKIN MEAD, JR., his father and next friend, JOHNNIE RUTH MEAD, and WILKIN MEAD, JR.,

Plaintiffs,

-vs-

UNITED STATES OF AMERICA,

Defendant.

March 15, 1984

I.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for trial before the Honorable William Beatty, District Judge, presiding, on a three count, third amended complaint. The first count of said complaint alleges that as a result of the negligent and outrageous acts on the part of the United States of America in exposing the plaintiffs to chlordane, the

plaintiff, Johnathan [sic] D. Mead, is certain to contract cancer; has suffered severe and permanent injury and damage to his entire body and to his central nervous system, and that he will in the future have psychic damage and mental and emotional anguish and distress as a result of necessarily observing the physical and mental sufferings of his mother, Johnnie Ruth Mead, and his father, Wilken Mead, Jr., as set out in Counts II and III of plaintiff's complaint. The second count of said complaint alleges that as a result of the negligent and outrageous acts on the part of the United States of America in exposing the plaintiffs to chlordane, the plaintiff Wilkin Mead, Jr., has and will in the future have psychic damage, mental and emotional anguish and distress as a result of observing the physical and mental sufferings of his son, Johnathan D.

Mead, and his wife, Johnnie Ruth Mead. The third count of said complaint alleges that as a result of the negligent and outrageous acts on the part of the United States of America in exposing the plaintiffs to chlordane, the plaintiff, Johnnie Ruth Mead, was rendered lame and disordered, suffered and sustained severe and permanent injury and damage to her entire body and to her central nervous system, that she is reasonably certain to contract cancer and, that she has and will in the future suffer great psychic pain and anguish and distress of her mind and emotional system as a result of necessarily observing the physical and mental suffering of her son, Johnathan D. Mead, and her husband, Wilkin Mead, Jr., as set forth in Counts I and II of plaintiffs' complaint. This suit is brought against the United States of America for alleged negligence

by the United States Department of the Air Force in applying a termite poison, chlordane, at air force housing in which the plaintiffs resided.

On August 24, 1978, unit 5543 F in Wherry Housing was treated with chlordane to control termites. Wherry Housing units are a part of the base housing at Scott Air Force Base. Those housing units were constructed on concrete slabs and the heating unit in those housing units at all times referred to herein consisted of a downfloor furnace and subslab ductwork. The ductwork in Unit 5543 F was encased in concrete. Unit 5543 F was treated with chlordane by drilling holes through the concrete slab and injecting chlordane into those holes and thereafter placing plugs into those holes. Those holes should have been drilled into the subsoil so that the chlordane would have been injected into the

subsoil. The Court finds however that the chlordane did not infiltrate either the heating duct or the cold air return ducts after injection into the subsoil, but was in fact injected directly into the heating ducts due to the failure of the applicators, the people applying chlordane, to drill in the proper places.

The Court further finds that apart from negligence in treating the unit the Government through its various agencies was aware that questions had been raised about the dangers of exposure to chlordane. As early as the first or second week in September, 1978, officials at Scott Air Force Base became aware of odors at the housing unit. Officials at Scott Air Force Base were negligent in not removing the plaintiffs from the unit as soon as they were advised of the fact that there was potential chlordane exposure

there.

Having found negligence the Court has considered the following findings in determining whether or not that negligence caused the injury complained of.

On August 25, 1978, when Johnathan Mead moved into unit 5543 F in Wherry Housing, he appeared to be in good health. The day before, August 24, 1978, that unit had been treated with chlordane.

The Court, taking into consideration its common experience, concludes that there would have been little, if any, need to operate the heating system during that month so that although there was chlordane exposure beginning on August 25, 1978, that exposure would have been relatively limited. However, on or about September 30, 1978, Johnathan Mead developed, in order, an inflammatory tonsillitis condition, 105 fever, and the first reported

seizure. The fever was reduced through usual methods and Johnathan Mead was returned to unit 5543 F.

The Court, again taking into consideration its common experience, concludes that during October, November and December the exposure to chlordane would not only have continued but would have been substantially elevated. This conclusion is based upon the assumption that plaintiffs' theory about the chlordane being in the heating ducts is correct and that the chlordane was coming out of the heat ducts. During October, November and December the heating system would be operating more and the amount of chlordane blown into the air and from the air falling on to the carpets, and getting on the toys, would increase. During those three months, however, Johnathan Mead was perfectly normal, no health problems were

reported and he was apparently in good health.

On or about January 7, 1979, Johnathan Mead again had a fever followed by flu-like problems other than what might be caused by chlordane. The child's mother had a flu-like illness at approximately the same time.

On or about January 10, 1979, had staring spells lasting from 15-20 seconds with eyelid blinking. On or about January 12, 1979, Johnathan Mead had a seizure which left his brain damaged. Johnathan Mead was then taken to Wilford Hall Medical Center and the diagnosis was a seizure disorder probably due to encephalitis and a post infectious encephalopathy. Johnathan Mead remained at Wilford Hall Medical Center for about three weeks and was returned home to unit 5543 F and the exposure to chlordane continued until on or

about April 5, 1979. During the time period between the time Johnathan Mead returned from Wilford Hall Medical Center and leaving unit 5543 F he had no seizures. Approximately six months after being removed from unit 5543 F, and while he is still taking a drug to control seizures, Johnathan Mead had still another seizure.

The Court in considering the aforementioned time sequences, the fever blister type sores that Johnathan Mead had and the high fever finds that Dr. Ferrendelli's testimony and diagnosis of post-infectious encephalopathy is very reasonable and the most logical and preferential diagnosis of Johnathan Mead's illness and residual brain damage. This conclusion is based also upon the fact that the plaintiffs' expert concedes that there is nothing in the medical literature that shows

a residual central nervous system chronic or acute effect from exposure to chlordane at the levels Johnathan Mead was exposed to and the reported cases of acute exposure do not support plaintiffs' position because there was no permanent damage to the central nervous system.

The Court finds that there is no evidence in the record from which it can find that it is more probably true than not true that chlordane caused Johnathan Mead's brain damage nor is there any evidence in the record to support the remaining allegations of plaintiffs' complaint that chlordane caused injury or damage to Wilkin Mead, Jr. or Johnnie Ruth Mead as alleged.

WHEREFORE, for the foregoing reasons the Court rules in favor of the defendant and against the plaintiff and judgment will be entered accordingly.

II. TRIAL COURT'S ORAL FINDINGS

THE COURT: The Court in trying a bench trial is bound by the same standards as would a jury be under similar circumstances. The Court must take heed of the same instructions that would be given to a jury in a similar case, that is to say that the Court must follow the same law that the jury follows, which means we must resolve the question of negligence.

I find from the evidence that there is ample material to put the Government on notice of, number one, the problems in treating slab dwellings with chlordane. The Government, in fact, knew of this as is evidenced by certain exhibits that the plaintiff put in evidence.

Counsel for the Government makes much of the fact that the heating ducts in this particular dwelling were encased in concrete. All that means is that to me at

least, is that the chlordane did not infiltrate either the heating duct or the cold air return ducts after injection into the sub-soil but was in fact injected directly into the heating ducts due to the failure of the applicators, the people applying this substance drilling in the right places. It's clear that the substance was injected through holes that were drilled in the concrete floor. Those holes should have been drilled into the sub-soil so that the material would have been injected in the sub-soil. If the heating ducts were in fact encased in concrete, it would not have infiltrated. It's obvious to me that in drilling these holes, at least one or more places, they drilled into the heating ducts, the chemical was injected into the heating ducts, and from there it was distributed into the house environment. Apart from the negligence, and I

find there was negligence in treating the houses, but apart from that, there was ample material available, the Government through its various agencies knew that there was certainly some question about the dangers of exposure to chlordane.

As early as the first week or two in September, the officials at Scott Field knew that there was some problem with this housing unit. They had reports of odors, and I think that they were negligent in not removing these people from the unit immediately as soon as they were advised of the fact that there was a potential chlordane exposure there.

Unfortunately, that's the easy part of the case, but having found negligence is not to say that that negligence caused the injury complained of. I want to say at the outset that in thirteen years of trying cases I have never been confronted

with more quote qualified medical testimony. Both Dr. Davies and Dr. Ferrendelli were emanately well-qualified. I was extremely impressed with their sincerity, their honesty. They were not the ordinary run of the mill professional witness that we usually see in cases of this type, and I am convinced that both of them were absolutely sincere and objective in the opinions and testimony that they gave.

In approaching the question of causation, we have to keep in mind as counsel has recognized that the burden of proof is on the plaintiff. The burden of proof is to show that the cause for which he speaks is more probably true than not true.

Dr. Horenstein, I think, can be substantially discounted as far as causation is concerned, and I don't think that plaintiff seriously contends that he adds a great deal of weight to the case for

causation. Dr. Horenstein, I think we can assume that his opinion is based substantially on the opinion of Dr. Davies, and I think that the plaintiff's case has to stand or fall with Dr. Davies, and I think with Dr. Davies, the plaintiff makes, certainly makes a prima facie case. Dr. Davies clearly and unequivocally states his opinion that the chlordane exposure could or might have caused the condition of illbeing that the plaintiff now complains of. Later he made even a stronger statement that he feels that this is of the possible causes, that this is the most probable in his opinion.

Dr. Ferrendelli is equally convinced that the chlordane exposure did not cause it and could not have caused it. Both doctors concede that there is little, if any, medical literature on the subject. We have only three, maybe four reported

cases. Dr. Davies concedes that there is nothing in the medical literature to show a residual central nervous system effect from exposure to chlordane, either chronically or acutely.

The three or four reported cases of acute exposure do not support the plaintiff's position in this case because there was no permanent damage at least to the central nervous system from the exposure.

In reading Dr. Davies' deposition, I get the impression that without the supplemental statistics from Dr. Kutz, Dr. Davies would have been hard put to conclude that this was caused by the chlordane.

So what we get down to is that his final opinion is almost entirely based upon a supplemental figures from Dr. Kutz which show that there is an abnormal concentration of chlordane in the fat biopsy

from this child, but even if we accept that, even if we accept the reliability of Dr. Kutz' later figures, even if we accept the credibility of the sampling and all those factors, we are still left with what Dr. Davies concedes is a problem. We have five or ten percent of the children, or even as high as sixteen percent of the children that have higher levels than this child and we transpose that into the population, we would have thousands of children with seizures and brain damage.

On the other side, Dr. Ferrendelli recognizes that there is no reported literature on it, he takes what appears to me to be a more reasonable approach. There is an obvious recognized causation, that is post-infectious encephalopathy, and he chooses that diagnosis.

Now apart from the medical or scientific evidence, I am impressed more by my

own logical analysis of the chronology of the events, and I think it is highly significant. We have a child who on August the 25th appeared to be in good health. He moved into a house which had the day before been treated with chlordane. Keep in mind that this is in September at Scott Field and although there is no evidence about what the weather was in 1978, '79, the Court will take its common experience and conclude that there would hve been little, if any, need to operate the heating system during that month.

So, that although there probably wasn't exposure to chlordane beginning on August 25th, that exposure would, it seems to me, have been relatively limited, and yet on or about the 30th of September the child developed in this order an inflammatory tonsillitis condition, one hundred and five fever, and the first reported

seizure. The child was taken to the emergency room, the fever was reduced with the usual methods. He was returned to the home. Now we're into October, November, December.

Again drawing on my common experience, during those three months the exposure would not only have continued, but would have been substantially elevated because this of course is assuming that the plaintiffs' theory about cause of the exposure is correct, but it was coming out of the heating ducts and I think all the evidence indicates that in these three months the exposure is going to be elevated because the heating system is going to be operating, the amount of chlordane blown into the air and from the air falling onto the carpets, getting onto the toys. It is going to substantially increase. But during those three months,

the child is perfectly normal. There is no report of problems. He is in good health. It is not until the first week or ten days of January that we again have an incident, again, fever, a little question about the child's condition, but we know that the mother had a flu-like illness and there is some suggestion that the child had some problems at that time other than what might be caused by the chlordane, but it's preceded by the fever.

Then again we have a seizure and then in a short period of time the final seizure that sequence which left him brain damaged.

Then he goes to Wilford Hall. He is down there, I have forgotten how long, but he's back in the home and the exposure continues then until April.

Now during that time, there are no seizures and even accepting counsel's

theory that this could be because he is on the phenobarbital, I think that is sort of a neutral thing, but then I think what is more significant is that he is removed from the environment in April and six months later, after he is presumably withdrawn from the exposure for six months, he has a final seizure, and he is still on phenobarb, or some other agent that we can control the seizures, whether is phenobarbital or Valporic Acid or whatever it is. Just looking at that time sequence, it seems very reasonble, and also taking into account the fever blister type sores that the baby had, the high fevers, it seems to me that Dr. Ferrendelli's choice of post-infectious encephalopathy is very reasonable and the most logical diagnosis, preferential diagnosis. It may well be that ten years down the road we may have documentation and reports that would support

plaintiffs' position in this case. We may not have. We may have just the opposite. Medical science may advance to this state ten years from now where we can tell that this wasn't chlordane and it wasn't post-infectious encephalopathy, it was sugar or chocolate or honey. The point I am making is we don't know what caused it. There is no evidence from the record from which I can find that it is more probably true than not true that the chlordane caused it. It is not necessary for me to find it, but I think that if I had to make a finding as to what did cause it, it is more probably true than not that it was the result of either a post-infectious allergic reaction, or an idiopathic seizure. These are tough cases. I don't know, I seem to have had several of these cases with children, and I think we're all sympathetic to the children's condition,

but I think we have to follow the law, so for the reasons stated I find the issues in favor of the defendant and against the plaintiff.

Mr. Simpkins, you or Mr. Coleman will prepare a suggested findings of fact and conclusions of law and submit them to counsel for the plaintiff for their approval as to form. That's all.

Supreme Court, U.S.
FILED
OCT 15 1985
JOSEPH F. SPANIOL, JR
CLERK

No. 85-424

In the Supreme Court of the United States

OCTOBER TERM, 1985

JONATHAN D. MEAD, A MINOR BY WILKIN MEAD, JR., HIS FATHER AND NEXT FRIEND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

Page

Cases:

Arnstein v. *Porter*, 154 F.2d 464 ..... 3, 4

Frechette v. *Welch*, 621 F.2d 11 ..... 3, 4

Hamling v. *United States*, 418 U.S. 87 3

Michelson v. *United States*, 335 U.S. 469 3

NLRB v. *Donnelly Garment Co.*, 330 U.S. 219 3

Salem v. *United States Lines Co.*, 370 U.S. 31 3

Salsman v. *Witt*, 466 F.2d 76 ..... 3, 4

Statutes and rules:

Federal Tort Claims Act:

28 U.S.C. 1346(b) 1

28 U.S.C. 2671 *et seq.* 1

28 U.S.C. 2111 4

Fed. R. Civ. P. :

Rule 32(a)(3) 3

Rule 32(a)(3)(B) 3

Rule 32(a)(3)(E) 3

Rule 61 4

Fed. R. Evid. 403 ..... 3, 4

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-424

JONATHAN D. MEAD, A MINOR BY WILKIN MEAD, JR., HIS FATHER AND NEXT FRIEND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court committed reversible error by sustaining an objection to an expert witness's repetition, during a bench trial, of testimony contained in the witness's previously admitted deposition.

1. On August 24, 1978, the Scott Air Force Base treated several military housing units with the insecticide "chlordane" to control termites (Pet. App. 10). Shortly thereafter, petitioner's family moved into one of the housing units. In January 1979, petitioner experienced a seizure that resulted in permanent brain damage (*id.* at 14).

Petitioner brought an action in the United States District Court for the Southern District of Illinois under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.* He alleged that the government negligently applied the insecticide and

that his resulting exposure to chlordane caused his disability (Pet. App. 1-2). Prior to trial, the parties agreed that a deposition of petitioner's expert witness, Dr. John Davies, would be admitted into evidence in lieu of his live testimony (*id.* at 3-4). The deposition was introduced and admitted at the commencement of the bench trial (*id.* at 4). Later, following presentation of petitioner's case, petitioner called Dr. Davies as a rebuttal witness (*ibid.*). The government objected to petitioner's elicitation of testimony already contained in Dr. Davies' deposition on the ground that the testimony was cumulative (*ibid.*). The court sustained the government's objection (*ibid.*). At the trial's conclusion, after considering all of the medical evidence, the district court held that post-infectious encephalopathy, rather than chlordane exposure, was the most probable cause of petitioner's disability (*id.* at 5).

The court of appeals affirmed in an unpublished order (Pet. App. 1-6). The court held that the trial judge did not abuse his discretion in limiting Dr. Davies' testimony and that petitioner could not have been prejudiced by exclusion of repetitious testimony (*id.* at 5).

2. The unpublished decision of the court of appeals is correct, does not conflict with decisions of this Court or other appellate courts, and presents no issues warranting this Court's review.

a. A district court has broad discretion in determining whether to admit or exclude expert testimony. As this Court has explained:

> Petitioners have very much the laboring oar in showing that such rulings constitute reversible error, since "in judicial trials, the whole tendency is to leave rulings as to the illuminating relevance of testimony largely to the discretion of the trial court that hears the evidence."

Hamling v. *United States*, 418 U.S. 87, 124-125 (1974) (quoting *NLRB* v. *Donnelly Garment Co.*, 330 U.S. 219, 236 (1947)). See also, *e.g.*, *Salem* v. *United States Lines Co.*, 370 U.S. 31, 35 (1962); *Michelson* v. *United States*, 335 U.S. 469, 480 (1948). "The District Court retains considerable latitude even with admittedly relevant evidence in rejecting that which is cumulative * * *." *Hamling*, 418 U.S. at 127. See Fed. R. Evid. 403. That authority is particularly broad when — as in this case — the district judge himself sits as the trier of fact.

Dr. Davies' deposition was submitted to the court prior to trial and was properly admitted into evidence (Pet. App. 3-4).[1] The district judge read it and carefully considered its contents (Pet. App. 19-23). Thus, the judge was well situated to determine whether Dr. Davies' subsequent live testimony, offered for rebuttal purposes, would be unnecessarily repetitive. The judge's ruling, only excluding testimony already set forth in the deposition, did not deny petitioner his opportunity to present proper rebuttal evidence. The judge acted well within the bounds of his discretion by excluding the cumulative testimony.

Petitioner mistakenly contends (Pet. 14-22) that the district court's ruling conflicts with *Frechette* v. *Welch*, 621 F.2d 11 (1st Cir. 1980), *Salsman* v. *Witt*, 466 F.2d 76 (10th Cir. 1972), and *Arnstein* v. *Porter*, 154 F.2d 464 (2d Cir. 1946). In *Frechette*, the First Circuit ruled that the district court erred, albeit harmlessly, in permitting use of a deposition at trial without satisfying the Fed. R. Civ. P. 32(a)(3)

---

[1]The record does not reveal the precise basis for admission of the deposition. Most likely, it was admitted on the basis that Dr. Davies, a Florida resident (see Pet. 7), was more than 100 miles from the place of trial. Fed. R. Civ. P. 32(a)(3)(B). However, it might also have been admitted on the court's determination that "such exceptional circumstances exist as to make it desirable * * * to allow the deposition to be used." Fed. R. Civ. P. 32(a)(3)(E). In all events, both petitioner and the government agreed to its admission.

criteria. 621 F.2d at 13-14. The deposition had been admitted without the agreement and over the objection of the opposing party. See *ibid.* Here, by contrast, *petitioner* himself introduced the deposition into evidence. In *Salsman*, the Tenth Circuit held that the district court erred in using depositions that had not been offered and admitted into evidence (see 466 F.2d at 77), a ruling that is facially inapplicable to the present case. In *Arnstein*, the Second Circuit held that the district court improperly entered summary judgment, over the plaintiff's objections, in the face of conflicting deposition testimony. 154 F.2d at 470. The court of appeals' discussion of the preference for live testimony, appearing in the context of summary judgment, is inapplicable to the present situation, which involved a bench trial on the merits in which petitioner himself chose to submit the deposition in lieu of live testimony.[2]

b. Even if the district court erred in excluding Dr. Davies' live testimony, the error would be harmless. See *Frechette* v. *Welch*, 621 F.2d at 13. A judge's exclusion of repetitive testimony in a bench trial plainly cannot prejudice any substantial right and, therefore, provides no ground for disturbing the judgment. See 28 U.S.C. 2111; Fed. R. Civ. P. 61.

---

[2]Petitioner denies agreeing to the use of the deposition in lieu of live testimony. However, the court of appeals, upon examination of the record, specifically found otherwise (Pet. App. 3-4, 5-6). That factual determination does not warrant consideration by this Court. In any event, the agreement is not critical to the exclusion of Dr. Davies' testimony. It is sufficient that Dr. Davies' deposition was admitted into evidence and that his live testimony would have been cumulative. See Fed. R. Evid. 403.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Acting Solicitor General

OCTOBER 1985